compensated by cost. I accordingly allow this amendment to paragraph 5(c) of the statement of defence.

As for the third part of the amendment, that the transactions between the parties are and were at all material times and in all material aspects governed by Singapore Law, Mr. Dass pointed out that points relating to law should and need not be pleaded. However, Mr. Paul Tan argued that the defendants are not pleading the law but that the transactions took place in Singapore.

There are allegations by the defendants that the transactions did take place in Singapore. A case in point is found in paragraph 4 of the statement of defence where, it was alleged that the loan agreements were for the sole purpose of financing a housing project in Singapore. Again in para 5(b) of the statement of defence, the defendants did contend that the plaintiffs have failed to operate the project account as provided under the provisions of the laws in Singapore. All these are allegations relating to transactions in Singapore and it is only justifiable to plead such facts. Applying the principles as laid down in *Yamaha*'s case, I allow the application for amendment to this part.

VOON MOW CHEN

v.

MENTERI DALAM NEGERI & ANOR. AND FIVE OTHER CASES

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL APPLICATION NO. 44-29-92, 44-33-92, 44-71-92, 44-81-92, 44-86-92, 44-90-92]
29 JUNE 1993

PRACTICE & PROCEDURE: Application for writ of habeas corpus - Affidavits in reply filed by the respondents - Whether affidavits in reply defective - Whether affidavits admissible in evidence.

Six criminal applications for writs of *habeas corpus* were heard together the sole issue being that the various affidavits in reply filed by the respondents were defective and were therefore inadmissible for the Court's consideration and afforded no answer to the applications.

Counsel for the applicants contended that the affidavits were defective for one or more of the following reasons:

(i) that the words "akui" or "diakui" were used in the respective affidavits.
(ii) that some of the affidavits were not signed by the deponent and some were not signed by the Commissioner of Oaths.
(iii) that some of the affidavits ended on a page and the jurat began on the following page or that the page bearing the jurat did not contain a substantial averment or spill-over of part of the last substantial averment in the affidavits.

The learned Senior Federal Counsel contended that by virtue of Order 2 rule 1 of the Rules of the High Court 1980 (RHC 1980), the failure to comply with format should be treated as a mere irregularity and should not affect the proceedings.

The further question that arose for determination was whether, as the parties had expressly agreed to stand or fall on the issue of the defective affidavits, it was proper for one party to subsequently renege on the undertaking and to be allowed to make further submissions.

Held:

[1] In an affidavit the permissible words to be used would be "ikrar" or "berikrar" for "affirm"

and "angkat sumpah" or "bersumpah" for "make oath" or "sworn". The use of the words "diakui" or "diperakui" in affidavits would make same defective and inadmissible unless leave of Court under O. 41 r. 4 RHC 1980 is obtained. By the same token affidavits which are not signed by the Commissioner of Oaths are also defective.

[2] An affidavit where the jurat begins and ends on a fresh page and does not immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition is also defective for lack of indication that the jurat relates directly to the deposition. Such affidavits are inadmissible without leave of Court, to be exercised at the discretion of the Court under O. 41 r.4 RHC 1980.

[3] Order 2 rule 1 RHC 1980 was inapplicable in the present cases as it is only a provision to validate proceedings which may be nullified due to failure to comply with form or contents after and not **before** the resolution of the proceedings or any steps in the proceedings.

[4] When both parties expressly undertake to the Court to stand or fall on and to confine themselves to certain points, it would be inimical to prompt disposal of cases to allow any party to renege on such an undertaking as this would entail the other party also having to back-out of his earlier undertaking.

[Applications allowed. Writs of habeas corpus issued. Applicants ordered to be released from detention with immediate effect. No order made with regard to second applicant as he had since been released].

Cases referred to:
Velumailum v. Public Prosecutor [1947] 13 MLJ 152 ***(refd)***
Teh Kim Chooi v. Regina [1955] 21 MLJ 37 ***(refd)***
Bill v. Bament [1841] 8 M & M 317 ***(foll)***
Re Heymann, Exp Heymann [1872] 7 Ch App 488; 26 LT 339; 29 WR 47, LJJ ***(foll)***
Amanah International Finance Bhd. v. Thien Juk Cheung & Ors. Suit No. KG 392 of 1986 ***(foll)***
Doe d Britton v. Clarke [1842] 2 Dowl NS 393; 12 LJQB 69 ***(refd)***
Wells v. Britton 7 Jur 327 ***(refd)***
Prentice v. Philipps [1842] 7 Jur 528; 12 LJ Ch 497 ***(refd)***
Philipps v. Prentice [1843] 2 Hare 542; 67 ER 224 ***(refd)***
Allen v. Tylor [1870] LR 10 Eq 52; 39 LJ Ch 627; 22 LT 512; 18 WR 888 ***(refd)***
Pilkington v. Hinsworth [1835] 5 LJ Ex 47 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964
Interpretation Act 1967, s. 62
Rules of the High Court 1980, O. 2(1), O. 41 r. 4
Statutory Declarations Act 1960, s. 2

Other sources referred to:
Kamus Dwibahasa 1979 Edn., Dewan Bahasa & Pustaka
Istilah Undang-Undang, Dewan Bahasa & Pustaka
Istilah Undang-Undang, Bahagian Penyelidikan dan Sekretariat Mahkamah Agung

For the applicants - V. Shanmugam; M/s. Shanmugam & Co.
For the respondents - Noorbahari, SFC

JUDGMENT

Vincent Ng Kim Khoay JC:
The applicant seeks redress in this Court for what he alleges to be illegal restraint of his person and unlawful deprivation of his liberty by way of this application for a writ of *habeas corpus*.

On 11 March 1993 midstream through the submission of Mr. V. Shanmugam the Counsel for the applicant in Criminal Application No. 44-29-92, he applied for the five other applications for writ of *habeas corpus* namely cases No. 2 to No. 6 above be heard together as he had also agreed to confine himself to only one common issue in all the six criminal applications wherein he was also the common Counsel. In C.A. 44-29-92 Counsel had submitted on various grounds but later abandoned them and it is, therefore, not necessary to refer or deal with these.

The sole issue being that the various affidavits in reply filed by the respondents in the above six respective applications (respondent's affidavits) were defective and were therefore inadmissible for the Court's consideration and afforded no answer to the applications. Counsel expressly agreed to stand or fall on this ground alone in all the six applications and requested for time to conduct further research for an extensive submission. Senior Federal Counsel Encik Noorbahari agreed to the above suggestion by Counsel.

The substantive argument on the grounds of the six above applications commenced only on 16 April 1993. It was submitted that the respective affidavits were defective for one or two of the following reasons:

(i) In all the six applications the words "akui" or "diakui" were used in the jurats of the respective affidavits [defect (i)].

(ii) The respondents' affidavits, namely Encl. 16 in criminal application number 44-29-92 was not signed by the deponent and Encl. 20 in Criminal App. No. 44-33-92 was not signed by the Commissioner of Oaths; [defect (ii)].

(iii) In criminal application number 44-33-92 (see Enclosure 7 and 27), Cr. Application No. 44-39-91 (see Encl. 19) and Cr. Application No. 44-89-92 (see Enclosure 10) the respondents' affidavits ended at a page and the jurat began on a following page or the page bearing the jurat did not contain a substantial averment or spill-over of part of the last substantial averment in the affidavits (defect (iii)].

On defect (i)

In essence, an affidavit is a statement in writing, made on oath or affirmation. The administration of oath or affirmation is, thus, an essential requirement of an affidavit, in order that there may follow several legal consequences if the obligation to tell the truth is broken. Affirmation is a substitute for an oath in the case of certain religionists who object, on grounds of conscience, to take an oath; it being still a solemn affirmation and entailing the same legal consequences for lying.

Affidavits are governed by Rules of the High Court 1980 made by the Rules Committee set up under the Courts of Judicature Act 1964 and Statutory Declarations are governed by the Statutory Declarations Act 1960.

In all the respondents' affidavits "diakui" or "diperakui" were used in the jurat. And, according to the dictionaries that are accepted as authoritative, the words "diakui" and "diperakui" is derivative of the word "mengakui" which means "declare or admit", and the words "to affirm" means "mengesahkan" in Kamus Dwibahasa 1979 (Edn.) by Dewan Bahasa dan Pustaka. Thus, such terms bear looser meaning and usage.

A looser term such as "diakui" or diperakui" may be permissible expressions for use in Statutory Declarations, indeed it is incorporated under the schedule (s. 2) "Borang Akuan" of the Statutory Declarations Act 1960. The reason being that all Statutory Declarations are required to end with the vital phrase "... this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1960". This vital phrase is necessary to give the sanction of the Enactment to the declaration. It was held in *Velumailum v. Public Prosecutor* [1947] 13 MLJ 152 that the omission of this vital phrase in the declaration made by the appellant, though in the form purporting to be a Statutory Declaration preclude same from being a declaration made under the Statutory Declarations Enactment; and that though it was wilfully forged and made for the purpose of fraud, yet it was not criminally punishable. Similarly, the omission of the words "Declared at ... this ... day of ... before me" was equally fatal. See *Teh Kim Chooi v. Regina* [1955] 21 MLJ 37.

In the current case, the impugned affidavits in reply filed by the respondents could not in any way be considered as statutory declarations by virtue of their use of the words "diakui" or "diperakui", as such documents do not contain the said vital phrase to acquire the sanction of the Statutory Declarations Act.

Whereas, according to Istilah Undang-Undang by Dewan Bahasa dan Pustaka and Daftar Istillah Undang-Undang by Bahagian Penyelidikan dan Sekretariat Bahasa Malaysia Mahkamah Agung, the words "swear or make oath" are translated as "bersumpah", and "affirm or to affirm" are translated as "ikrar" or "berikrar". As such, the three words permissible for use in jurats of affidavits would be "berikrar, or "mengesahkan" if one is a non-believer of God and "angkat sumpah" or "bersumpah" for a believer who swears.

It is thus wholly improper and impermissible to employ the words "diakui" or "diperakui" in jurats of affidavits, and I hold that such words if used would render such affidavits defective. In this regard I may seem pedantic or overly concerned with semantics. It is nevertheless my view that "diakui" or "diperakui" are neither sanctioned by the definition of these words in the two Istilahs Undang-Undang nor the authoritative dictionaries. Such words are acceptable only for Statutory Declarations under the Statutory Declarations Act, but only provided when the words "diakui" or diperakui" is coupled with the said statute-prescribed vital phrase.

On defect (ii)

The case of *Bill v. Bament* [1841) 8 M & M 317, 10 LJ Ex 302; 5 Jur 510, 151 ER 1060 is an authority which held that the jurat which was

not signed by the commissioner rendered the affidavit irregular, and all proceedings thereon were set aside. Similarly in the case of *Re Heymann, Ex p Heymann* [1872] 7 Ch App; 488, 26 LT 339; 29 WR 47, LJJ. it was held that the omission by the commissioner to sign the jurat was also fatal and such a defect could not be cured by the commissioner signing the jurat on the hearing of the application to discharge the warrant for committal of a bankruptcy. I agree with the Courts' decision in the above cases, and I hold to be defective, such similar affidavits filed in the instant cases.

On defect (iii)

It is this Court's view that the reason that the jurat of an affidavit should not begin and end on a fresh page but rather should immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition, is in order to ensure that there is sufficient indication that the jurat relates directly to the deposition. This is also in order to obviate the possibility of abuse by any party who may pre-execute jurats of affidavits in the absence of any averments for attachment to subsequently prepared averments. On account of this, it was held in the case of *Amanah International Finance Bhd v. Thien Juk Cheung & Ors.* Suit No KG 392 of 1986 (High Court, Kuching (Haidar J)) 4 September 1989 that the affidavit of X was defective as the jurat of the affidavit began and ended on a fresh page and did not follow immediately after the end of the deposition. I wholly agree and subscribe to the ratio in this case and I hold to be defective, such similar affidavits filed by the respondents here.

On the issue of admissibility of defective affidavits, the Courts have held as follows:

An affidavit commencing thus: "O.S., of etc , maketh and saith", the word "oath" being omitted will not be received by the Court even though it purports by the jurat to have been duly sworn. *Doe d Britton v. Clarke* [1842] 2 Dowl NS 393; 12 LJQB 69; *sub nom Doe d Britton v. Clarke, Wells v. Britton* 7 Jur 327. *Prentice v. Philipps* [1842] 7 Jur 528.

Also, an affidavit which does not express that the deponent "made oath" is not admissible. *Philipps v. Prentice* [1843] 2 Hare 542; 67ER 224, sub nom *Prentice v Philipps* 12 LJ Ch 497; 7 Jur 528.

In another case, the omission in the formal part of an affidavit of the words "make oath and" will render it inadmissible. *Allen v. Tylor* [1870] LR 10 Eq 52; 39 LJ Ch 627; 22 LT 512; 18 WR 888.

In the event, I hold that defective affidavits should not be used in *habeas corpus* applications, as affidavit evidence are the sole evidence to enable the Court to arrive at a just decision in such applications. If there is a flaw in the affidavit, same cannot be admitted in evidence without leave of the Court. A petition for *habeas corpus* is a writ petition, of a quasi-criminal nature, thus attracting a higher standard of proof and requirement. As such, the inadmissibility, due to invalidity, of a vital affidavit would be fatal.

In answer to the points raised by Counsel on defects (i), (ii) and (iii) above, Encik Noorbahari submitted that by virtue of O. 2(1) of the Rules of the High Court, the failure if any, to comply with format should be treated as a mere irregularity and should not affect the proceedings.

Order 2 (1) reads as follows:

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

I do not agree. As clearly O. 2 r. 1 (which ought to be read in conjunction with O. 41 r. 4 of the Rules of High Court 1980) does not oblige the Court to accept defective affidavits. Rather, it is in essence a provision to validate proceedings which may be nullified due to failure to comply with, *inter alia*, form or content **after (not before)** the resolution of the proceedings or any steps in the proceedings. It clearly does not preclude the exercise of the Court's discretion as to whether or not to accept as evidence an affidavit filed in Court. That the Court is cloathed with such discretion is clear, as O. 41 r. 4 provides that "An affidavit may with leave of the Court, be filed, **or used** in evidence notwithstanding any irregularity in the form thereof".

No application was made by Encik Noorbahari for an adjournment in order to file fresh cor-

rected affidavits, and neither was any application made to the Court under O. 41 r. 4 above. This Court would have granted the former application but would have been less inclined to grant the latter, if made, especially in regard to the misplacement of the jurat. It is injudicious and against the interests of justice for Courts not to make manifest through resolute measures, its views that it should not allow - through bad precedents - a situation to prevail, which permitted the pre-execution of jurats only as aforesaid, or to give occasion for doubt as to the identity of the jurats *vis-a-vis* the contents of the affidavits. I do not intend by this to convey the impression that such transgressions have occurred in the current applications. Nevertheless, quite obviously, the decision in *Amanah International Finance Bhd. (supra)* was meant to prevent such a situation from occurring. (See also *Pilkington v. Hinsworth* [1835] 5 L.J. Ex. 47).

For the above reasons and upon the authorities, I hold that the above stated respective respondents' affidavits overstated are tainted with, defect (i) in respect of all the above applications and defect (ii) or (iii) in respect of some of the applications as submitted by Counsel. Such affidavits are thereby inadmissible in evidence to answer the six respective applications.

The final draft of my judgment was completed at the end of May. However, on 25 June 1993 I received by facsimile, a further written submission dated 25 June 1993 from Encik Noorbahari who also notified the Court that in the event the Court rules against the respondents today on any of the two points, he intends to make an application under O. 41 r. 4 (that I have discussed above).

It is further submitted that defects in the affidavits if any is validated by virtue of s. 62 of the Interpretation Act 1967, as the deviation from form has no substantial effect and is not calculated to mislead, and also such defects should be treated as irrelevant under the "*deminis non curat lex*" principle.

In my view, s. 62 of this Act is not intended to give licence to parties to indulge in haphazard formulation of documents e.g. affidavits;, and misplacement of jurats as aforesaid may itself be misleading. It is also my view that neither s. 62 nor the *deminis* principle could fetter or in any way shackle the Court's right to refuse or to exercise its discretion expressly provided under O. 41 r. 4 of the Rules of the High Court 1980, especially on matters of form and procedure to be adopted in Court.

At the 11 March 1993 hearing both parties expressly agreed to stand or fall on the above two points that I have decided. Such points were never canvassed as preliminary points at any time during the several hearings and adjournments requested by Senior Federal Counsel. Then, when the hearing of submissions on the instant 6 applications were completed on 21 April 1993, the Court granted the request of Encik Noorbahari, a grace period of one week to submit further in writing, if he needed, and Counsel Encik Shanmugam to reply within one week thereafter. A date for delivery of my judgment was also then fixed.

If this Court were to allow Encik Noorbahari to renege on his above undertaking to stand or fall on my decision in respect of the two aforesaid points, by allowing his application under O. 41 r. 4 at this late hour and after the said period of one week, a similar application by Encik Shanmugam to back out of his earlier undertaking to confine the grounds of the instant applications to only the two aforesaid common points, would also have to be granted; with further time to be allowed to him to submit on other grounds indicated to the Court earlier. This course of action if adopted by the Court would he inimical to prompt disposal of applications such as the current applications, especially when such applications are solely to be decided upon affidavits.

For the above reasons, the belated application by Encik Noorbahari for the affidavits that I have ruled to be defective to be admitted in the proceedings under O. 41 r. 4, is disallowed.

The Court is now informed that the second applicant under 44-33-92 has since been released and Counsel prays for no order in that application.

In the event, I would allow all the other five applications; and I hereby order writs of *habeas corpus* to issue and the five applicants to be released from detention with immediate effect.

In *postscriptum*; I am mindful that the above ruling by this Court on the form that affidavits should take, may not decisively affect future proceedings in this and other Courts, in view of

the said O. 41 r. 4 and s. 62 of the Act. Nevertheless, the decision above is arrived at with the view and in the exercise of the Court's duty to regularise or systematize the adoption of proper forms and formats, which at any rate, are prescribed in the Rules, and on an issue which is eminently within the proper governance of the Courts.

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